STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYRONE DOUGLAS BRADFORD,

Defendant-Appellant.

UNPUBLISHED
June 1, 1999

No. 203505
Alger Circuit Court
LC No. 96-001257 FH

Before: Whitbeck, P.J., and Markman and O'Connell, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault on a prison employee, MCL 750.197c; MSA 28.394(3), and was sentenced to a term of one and one-half to four years' imprisonment, to be served consecutively to the sentence he was already serving. He now appeals of right and we affirm.

This case arises from an incident at the Alger Maximum Security Facility, where defendant was an inmate, on March 29, 1996. As defendant was being escorted to his cell in belly chains after a trip to the health services room, an altercation occurred between defendant and the accompanying guard. Both defendant and the guard fell to the floor, and defendant bit the guard's hand. Defendant's trial and conviction followed. Defendant raises four issues on appeal, none of which merits reversal.

I

Defendant first contends that his due process right to a fair and impartial trial was violated by the trial court's decision to require him to wear leg restraints at trial in the presence of the jury. We review the court's decision in this regard for an abuse of discretion in light of all the circumstances. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996). An abuse of discretion occurs only where a court's action is so violative of fact and logic as to constitute perversity of will or defiance of judgment. *People v Laws*, 218 Mich App 447, 456; 554 NW2d 586 (1996). The shackling of a criminal accused at trial is disfavored, and is proper only to prevent the accused from attempting escape, injuring others, or otherwise disrupting the proceedings. *Dixon*, *supra*.

In this case, the trial record indicated that defendant was lodged in the segregation unit of a maximum security facility and that this unit was reserved for disruptive, highly unmanageable prisoners. Prison authorities had asked that defendant be kept in full body restraints. The trial court declined to do this, but referred to defendant's treatment file, noted that only two guards[1] had accompanied defendant to trial, and decided that defendant should wear leg shackles throughout trial.[2] A court may properly consider an incarcerated defendant's institutional misconduct record when deciding to impose restraints at trial. *Dixon, supra* at 405, citing *People v Julian*, 171 Mich App 153, 160-162; 429 NW2d 615 (1988). For these reasons, we conclude that the trial court evidenced no "perversity of will" or "defiance of judgment" in deciding to keep defendant in leg shackles.

II

Defendant argues that the trial court abused its discretion by overruling his objection to a question asking a witness to explain "segregation." The witness was permitted to explain that "segregation" was a unit "for disruptive, highly unmanageable prisoners that are either handcuffed behind the back with a strap or belly chains when they come out of their cell for movement." Defendant argues on appeal that this information constituted impermissible character evidence which permitted the jury to infer guilt from defendant's status as a disruptive and difficult prisoner, rather than deciding the case by resolving the conflicting testimony. However, defense counsel objected to the prosecutor's question on the ground of relevance, not on ground of improper character evidence. To preserve an evidentiary issue for appellate review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. MRE 103(a)(1); *People v Welch*, 226 Mich App 461, 464; 574 NW2d 682 (1997). Thus defendant has waived appellate consideration of the character-evidence question. Defendant likewise raises for the first time on appeal the issue whether the evidence, though relevant, was substantially outweighed by the danger of unfair prejudice, citing MRE 403. Again, the lack of an objection at trial on this ground waives appellate consideration. Our review is thus limited to preventing manifest injustice. MCR 2.613(A); MCL 769.26; MSA 28.1096; *People v Metzler*, 193 Mich App 541, 548; 484 NW2d 695 (1992). We find no manifest injustice here.

As an initial matter, we note that defense counsel made issue of the circumstances of defendant's confinement, arguing that because defendant came from a maximum security segregation unit, the guard involved in the incident overreacted in response to the mistaken belief that defendant was attacking him. Because defendant raised this issue, the brief description of the segregation unit elicited by the prosecutor was proper evidence.

Further, this Court will not in any case reverse on the basis of an evidentiary error unless the ruling affected a party's substantial rights. MCR 2.613(A); MRE 103(a); *Temple v Kelel Distributing Co*, 183 Mich App 326, 329; 454 NW2d 610 (1990). Here, before the introduction of the comment describing the segregation unit, the jury was informed that defendant was housed in the segregation unit of a maximum security prison, and that he had been shackled in belly chains, at the time of the incident in question. Both parties then offered substantial additional testimony regarding these facts. A witness' brief explanation confirming what the jury should already have understood could have caused minimal prejudice at worst. See *Estelle v Williams*, 425 US 501, 507; 96 S Ct 1691; 48 L Ed 2d 126 (1976)

("No prejudice can result from seeing that which is already known."), quoting *United States ex rel Stahl v Henderson*, 472 F2d 556, 557 (CA 5, 1973).

For these reasons, we conclude that defendant's argument concerning mention that he had been in the segregation unit warrants no appellate relief.

III

Defendant next contends that the trial court's direction to the jury to return after dinner to continue deliberations coerced a verdict from the jury and thus deprived him of his right to a fair trial. Again, defendant did not object to the trial court's decision to have the jury continue deliberations and therefore review of this issue is waived in the absence of a showing of manifest injustice. MCR 2.613(A); MCL 769.26; MSA 28.1096; *Metzler, supra*. We find no manifest injustice here.

A trial judge's general conduct of a trial is reviewed on appeal for an abuse of discretion. See *People v Cole*, 349 Mich 175, 200; 84 NW2d 711 (1957); *People v Wigfall*, 160 Mich App 765, 773; 408 NW2d 551 (1987). "Claims of coerced verdicts are reviewed case by case, and all the facts and circumstances, including the particular language used by the trial court, must be considered." *People v Vettese*, 195 Mich App 235, 244; 489 NW2d 514 (1992). Our review of all the circumstances of this case leads us to conclude that the trial court did not coerce the verdict.

The record indicates that after the first two hours of jury deliberations, the foreperson indicated that further deliberations would be fruitless. However, three jurors then suggested that with additional deliberation a verdict could be reached. When the court asked if the jurors preferred to continue that evening rather than come back the following day, the court noted that it was "getting mostly nods." Although two jurors indicated that they would prefer coming back the following day because of a long drive home, the trial court nonetheless concluded that the jury should come back after a short dinner break to continue deliberating while the evidence was especially fresh in the jurors' minds. The court also assured the jurors that they would not be detained "an unconscionable period of time after supper." We defer to the trial court's determination that the jurors were disposed to continue meaningful deliberations that evening if allowed a dinner break. We find no abuse of discretion.

IV

Finally, defendant argues that he was denied due process of law because prison staff failed to preserve a videotape of the incident in question. Again, defendant did not raise this issue below, and thus we review this unpreserved matter only to the extent required to avoid manifest injustice. MCR 2.613(A); MCL 769.26; MSA 28.1096; *Metzler, supra*.

"Defendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith." *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). In the instant case, defendant has failed to show either.

It was the prosecution that brought to light that the prison maintained a videotape surveillance system, and that the videotape in question was recycled because prison personnel had accidentally

failed to preserve it. Defendant presented no evidence to contradict these assertions. The failure of the state to preserve the videotape in this instance might at worst be described as negligence. See *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281 (1988). Indeed, "[n]one of this information was concealed from [the defendant] at trial." *Id*. Defendant's implication that the state may have intentionally destroyed the videotape evidence is bare speculation. Because defendant presents no other evidence of bad faith, defendant failed to sustain this argument. *Johnson*, *supra* at 365-366.

Further, defendant has failed to show that the videotape evidence was exculpatory. The trial testimony indicated that the tape would probably have shown defendant and the guard only falling, the fracas on the floor that followed taking place out of the camera's view. Because defendant failed to explore this question further at trial, or in a post-trial proceeding, defendant has failed to establish that the tape would have been exculpatory. Accordingly, we conclude that no manifest injustice will result if we decline to consider this issue further.

Defendant additionally characterizes defense counsel's failure to request an instruction that the jury could infer the videotape would have been unfavorable to the prosecution as constituting ineffective assistance or counsel. We disagree. Because defendant did not move for a new trial or a *Ginther*[3] hearing below on this ground, our review of this claim of ineffective assistance is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). To prove ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to result in deprivation of a fair trial. *Strickland v Washington*, 466 US 668, 687-688, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). The defendant must further show that the result of the proceeding was fundamentally unfair or unreliable, and a reasonable probability that but for counsel's poor performance the result would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

Defendant cites cases in which such instructions of the sort here in issue were provided, but none that stands for the proposition that a defendant is necessarily *entitled* to such an instruction. Indeed, in *People v Davis*, 199 Mich App 502, 514-515; 503 NW2d 457 (1993), this Court held that the trial court did not err in declining to give such an instruction where the defendant failed to demonstrate bad faith in the failure to produce the evidence. Defendant has failed to demonstrate bad faith in the instant case and therefore, under *Davis*, *supra*, defendant was not entitled to such an instruction. Because defendant was not entitled to the instruction, trial counsel could not have been ineffective for failing to request it. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997) ("Defense counsel was not required to raise a meritless objection."). For these reasons, defendant has failed to carry his burden of

demonstrating that his counsel rendered ineffective assistance.

Affirmed.

/s/ William C. Whitbeck
/s/ Stephen J. Markman
/s/ Peter D. O'Connell

[1] Defendant insists that in fact other prison personnel were present, arguing that this further calls into question the need for keeping defendant in restraints. However, the record does not clearly indicate that the additional personnel were always present and ready to assist. For that reason, and because the reason for the presence of the additional personnel was to appear as witnesses, not to aid in securing defendant, we reject defendant's argument.

[2] The court further noted that leg locks, a less conspicuous form of restraint than conventional shackles, were not available as an alternative.

[3] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).